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QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN ANY PART OF THE WORLD

Written statement* submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31

[10 December 1999]

* This written statement is issued, unedited, as received from the submitting non-governmental organization.

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I. The report of the Special Rapporteur for the former Yugoslavia (E/CN.4/...) presents a comprehensive panorama of the human rights situation in that region.

However, in that document the AAJ wishes to refer especially, not to the violations of human rights which have been almost unanimously denounced and condemned by the international community and also through the jurisdictional work of the International Tribunal for the former Yugoslavia, but to those violations which are being almost entirely ignored (except by the Special Rapporteur), notwithstanding the fact they are intrinsically of the utmost gravity and because they are being committed through acts or omissions by a coalition of major powers which has taken upon itself the role of representative of the international community and of the worldwide policeman and guarantor of human rights.

The Special Rapporteur refers to these violations in his report A/54/396-S/1999/1000 (24 September 1999) (E/CN.4/...), in particular in paragraphs 91 (use of depleted uranium in ammunition, cluster bombs, the ethnic cleansing of nearly 200,000 non-Albanians from Kosovo), 92 (absence of legal safeguards and lawlessness currently prevalent in Kosovo), 94 and 103 (material destruction and deaths of civilians during the NATO bombardments) 96 and 97 (impunity of the KLA), 101 (violations of freedom of expression) and 102 (ecological damage).

In the addendum A/54/396/Add.1-S/1999/1000/Add.1 (3 November 1999) (E/CN.4/...) to his report, the Special Rapporteur describes the violations of human rights which are still being committed in Kosovo (paras. 26, 27 and 28). In paragraph 34 he states that "our problem is that this is now happening in the presence of UNMIK, KFOR and OSCE".

In paragraph 29 of the addendum the Special Rapporteur notes the inaction of the International Tribunal for ex-Yugoslavia in the face of these violations.

II. The AAJ, together with a group of Canadian jurists, has sought to stimulate the International Tribunal for the former Yugoslavia into activity in that direction; on 7 May 1999 they filed a complaint with the prosecutor of the Tribunal against the leaders of NATO. A meeting with the prosecutor was held in June, and a second meeting was held with the new prosecutor in November.

Some of the legal arguments set out in the complaint (in addition to pointing out that the armed attack launched by NATO of itself constituted a violation of the United Nations Charter) were as follows:

1. The general strategy of NATO, which consisted of launching attacks from a distance (missiles) or from aeroplanes flying at an altitude of 5,000 metres, prevented the taking of the "precautions in attack" stipulated in article 57 of Protocol I to the Geneva Conventions and violates the "basic rule" laid down in article 48 of that Protocol, namely that a distinction must always be made between the civilian population and combatants and between civilian objects and military objectives, and that operations must be directed only against military objectives.

Although that strategy was clearly likely to cause damage prohibited by the Geneva Conventions, it was decided to resort to it. Criminal liability thus arises because of the possibility of wilful damage, i.e. when the author of a course of action is aware that that course of action may cause prohibited damage but pursues it nonetheless.

The generalized and deliberate attacks against the civil infrastructure, and particularly against electric power stations and drinking water sources and pipelines, violated article 54, paragraph 2, of Protocol I, under which it is prohibited to render useless objects indispensable to the survival of the civilian population.

Equally, there was failure to comply with the provision in article 52, paragraph 3, of Protocol I to the Geneva Conventions to the effect that, in case of doubt, an object which is normally dedicated to civilian purposes shall be presumed not to be used for military purposes. The aerial attacks against Yugoslavia have the characteristics of war crimes as defined in the Geneva Conventions of 1949, its Optional Protocols of 1977, the Hague Conventions of 1889 and 1907 and other instruments of international humanitarian law.

These crimes could also be designated as crimes against humanity (article 6, subparagraph (c), of the Charter of the Nurnburg Tribunal ("murder ... and other inhumane acts") and of article 5 of the Statute of the International Tribunal for the former Yugoslavia (crimes against humanity, and in particular (a) murder, and (i) other inhumane acts)).

The provisions of international humanitarian law and the Charter of the International Military Tribunal of Nurnberg are instruments of positive law still in force and are particularly applicable to this case under the Statute of the International Tribunal for the former Yugoslavia, which has competence to try persons responsible for such crimes.

3. The use of cluster bombs, designed to destroy "soft" objectives (that is to say, to bring about in an indiscriminate fashion the deaths of the largest possible number of persons) and of projectiles containing depleted uranium (which cause widespread and long-term damage), and also the bombardment of chemical factories, which gives rise to the dissemination of toxic products in the environment (widespread and possibly long-term damage), are all violations of the provisions of article 35, paragraph 2, of Protocol I (prohibition of employment of projectiles and material and methods of warfare of a nature to cause superfluous injury), paragraph 3 of the same article (prohibition of employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment), article 36 (new weapons which are or might be prohibited by the Protocol or any other rule of international law - the small bombs contained inside cluster bombs which remain in the ground without an exploding function in the same way as anti-personnel mines, which are prohibited under the Ottawa Convention of 1997, which came into force on 1 March 1999) and the provisions of article 55 of Protocol I, which states that "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage".

Unexploded cluster bombs are still claiming victims in Kosovo. On 21 June two Gurkha members of the British contingent and two Albanian civilians were killed by the explosion of

two of these bombs. In September, too, a number of children were maimed as a result of the explosion of bombs of this type. It is estimated there are 20,000 of these unexploded bombs scattered in various places.

The above are, in condensed form, some of the arguments advanced by the AAJ and the Group of Canadian jurists to the prosecutor of the tribunal for the former Yugoslavia.

4 But the leaders of NATO and the OSCE have incurred other serious responsibilities. The decision to begin bombardments, and the ensuing withdrawal of all the OSCE observers, implied deliberate dereliction by the OSCE and NATO of their duty as guarantor of the enforcement of human rights in Kosovo, which they had already accepted and had begun to implement.

It might be argued that that decision was a manner of discharging the function of guarantors by other and more effective means. But the developments - which were foreseeable - which took place in Kosovo from 20 March onwards - the exponential stepping up of repression and the mass exodus of the population - show that the result was the opposite of that which, supposedly, it was sought to achieve.

The indictment charging Milosevic and other Yugoslav leaders with war crimes and crimes against humanity contains the following (para. 36): "immediately on the beginning of the aerial bombardments, the forces of the RFY and Kosovo intensified their systematic campaign and forcibly expelled hundreds of thousands of Albanians from Kosovo", while paragraph 37 states: ... "beginning on 24 March 1999, the forces of the RFY and Serbia engaged not only in forcible expulsions but also in numerous massacres of Albanians in Kosovo".

The obvious conclusion is that the maintenance of the observers in the field would have prevented the result described in paragraph 36 of the indictment.

Consequently, the withdrawal of the observers implies the complicity of NATO and the OSCE, in the form of commission by omission, in the crimes committed in Kosovo between 24 March and 9 June 1999.

"All the duties relating to the avoidance of a result are based on the fundamental idea that the protection of the endangered legal asset depends on a positive input by a particular person and that those concerned put their trust in active intervention by that person and can do so." (Jeschek, Lehrbuch des Strafgesetzes)

Jeschek goes on as follows: "complicity by omission may also be appropriate inasmuch as the accomplice has a duty as a guarantor. As a rule, the distinction between co-authorship and complicity does not raise problems here because, together with the author of a fraudulent offence of commission, who controls the situation, the contribution to that offence by the guarantor who takes no steps to avert it in principle only comes under the heading of complicity."

5 The leaders of NATO have an objective responsibility for the crimes currently being committed in Kosovo against the Serbs and other minorities and against the Albanians whom the KLA describe "collaborationist". That responsibility derives

1 From the general principles of international law, which stipulate that whoever has effective control of a territory is responsible for the security of its inhabitants,

2 From article 2 of the Fourth Geneva Convention of 1949 (protection of civilian persons in time of war), which states "the Convention shall also apply to all cases of partial or total occupation of the territory by a high contracting party, even if the said occupation meets with no armed resistance",

3 From the commitment accepted by NATO, represented by General Michael Jackson, in the "military technical agreement" of 9 June 1999, annex A 1 of which stipulates "the internal security force (KFOR) will deploy and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment with all citizens of Kosovo",

4 From Security Council resolution 1244 (1999), which contains the following "9 Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include

(b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below,

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task, "

5 And without doubt they are responsible for the crimes committed by the KLA, which has been converted into a "civil force" acting under the supervision of KFOR.